



305443

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

v.

T.L. DIAMOND & CO., INC. and  
THEODORE L. DIAMOND,

Defendants.  
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) Civil Action No. 08-3079  
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**CONSENT DECREE**

**I. BACKGROUND**

A. The United States of America ("United States" or "Plaintiff"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred by the United States for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Eagle Zinc Site in the City of Hillsboro, Montgomery County, Illinois.

B. T.L. Diamond & Co., Inc. ("TLD") has spent more than \$600,000 on the Remedial Investigation and Feasibility Study ("RI/FS") of the Eagle Zinc Site pursuant to an Administrative Order by Consent effective December 31, 2001. That expenditure by TLD represents the majority

of the costs spent on the RI/FS to date.

C. Theodore L. Diamond ("Mr. Diamond") voluntarily assisted in the completion of the RI/FS, by loaning TLD \$250,000, which sum was necessary on an interim basis to pay environmental consulting costs.

D. TLD and Mr. Diamond (collectively "Settling Defendants") do not admit any liability to the United States arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

E. The United States has reviewed the Financial Information submitted by TLD to determine whether TLD is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, the United States has determined that TLD is able to pay the amounts specified in Section VI (Payment of Response Costs).

F. The United States and the Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,  
ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over

Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, and upon Settling Defendants and their heirs, successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.
- b. "Certification of Completion of the Remedial Action" shall mean the certification by EPA that remedial action at the Site has been completed pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3).
- c. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.
- d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the

period shall run until the close of business of the next working day.

e. "Mr. Diamond" shall mean Mr. Theodore L. Diamond.

f. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

h. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

i. "Financial Information" shall mean those financial documents identified in Appendix A.

j. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

k. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

l. "Parties" shall mean the United States and the Settling Defendants.

m. "Plaintiff" shall mean the United States.

n. "Response Action" shall have the same meaning as "Response" under Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

o. "RCRA" shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, et seq.

(also known as the Resource Conservation and Recovery Act).

p. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

q. "Settling Defendants" shall mean TLD and Mr. Diamond.

r. "Site" shall mean the Eagle Zinc Site, encompassing approximately 132 acres, located at N.R. Highway 16 in the City of Hillsboro, Montgomery County, Illinois, and generally shown on the map included in Appendix B as well as areas to which hazardous substances released at the Eagle Zinc Site have migrated.

s. "TLD" shall mean T.L. Diamond & Co., Inc.

t. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. STATEMENT OF PURPOSE**

4. Purpose of Settlement with TLD. By entering into this Consent Decree, the mutual objective of the United States and TLD is for TLD to make a cash payment, based on its ability to pay, to address its liability for the Site as provided in the Covenant Not to Sue by Plaintiff in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

5. Purpose of Settlement with Mr. Diamond. By entering into this Consent Decree, the mutual objective of the United States and Mr. Diamond is for Mr. Diamond to make a cash payment, which includes a premium, to avoid litigation addressing his liability, if any, for the Site as provided in the Covenant Not to Sue by Plaintiff in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

## **VI. PAYMENT OF RESPONSE COSTS**

6. Within 30 days of entry of this Consent Decree, TLD shall pay to the United States, on behalf of EPA, \$500,000, plus an additional sum for Interest on that amount calculated from the date of lodging of this Consent Decree through the date of payment.

7. Within 30 days of entry of this Consent Decree, Mr. Diamond shall pay to the United States, on behalf of EPA, \$250,000, plus an additional sum for Interest on that amount calculated from the date of lodging of this Consent Decree through the date of payment.

8. Payments by Settling Defendants shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2007 cv 00430 the EPA Region and Site Spill ID Number B5Y7, and DOJ Case Number 90-11-3-08502. Payments shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office for the Central District of Illinois following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

9. At the time of payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill Identification Number B5Y7, DOJ case number 90-11-3-08502, and the civil action number.

10. The total amount to be paid by the Settling Defendants pursuant to this Section shall be deposited in the Eagle Zinc Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or, if not necessary, in EPA's unreviewable discretion, to conduct or finance response actions at or in

connection with the Site, to be transferred by EPA to the EPA Hazardous Substance Superfund.

## **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

11. Interest on Late Payments. If any Settling Defendant fails to make any payment under Section VI (Payment of Response Costs) by the required due date, Interest shall continue to accrue on the unpaid balance owed by such Settling Defendant through the date such balance is paid. The Settling Defendant that failed to make a payment shall pay any interest accrued under this Paragraph.

12. Stipulated Penalty.

a. If any amounts due under Section VI (Payment of Response Costs) are not paid by the required date, the Settling Defendant liable for payment of such amount shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 11, \$500 per violation per day that such payment is late.

b. If TLD does not comply with Section XII (Access and Institutional Controls), TLD shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, \$500 per violation for the first 5 days of such noncompliance, and \$1,000 per day thereafter.

c. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number B5Y7, and DOJ Case Number 90-11-3-08502, and shall be sent to:

U.S. Environmental Protection Agency  
P.O. Box 371531  
Pittsburgh, PA 15251-7531

d. At the time of each payment, the Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number B5Y7, DOJ Case Number 90-11-3-08502, and the civil action number.

e. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due or the day a violation occurs, and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

13. If the United States prevails on an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

14. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

15. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling



Defendants from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

#### **VIII. COVENANT NOT TO SUE BY PLAINTIFF**

16. Covenant Not to Sue TLD by United States. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against TLD pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site. With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by TLD of its obligations under this Consent Decree. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by TLD. If the Financial Information is subsequently determined by EPA to be false in or, in any material respect, inaccurate, when submitted to EPA, TLD shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 30 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from TLD's false or materially inaccurate information. This covenant not to sue extends only to TLD and its successors and assigns (solely in their capacity as successors or assigns) and does not extend to any other person.

17. Covenant Not to Sue Mr. Diamond by the United States. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not

to sue or to take administrative action against Mr. Diamond pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Section 7003 of RCRA, 42 U.S.C. § 6973, relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of the Remedial Action. This covenant not to sue is conditioned upon the satisfactory performance by Mr. Diamond of his obligations under this Consent Decree. This covenant not to sue extends only to Mr. Diamond and his heirs (solely in their capacity as heirs) and does not extend to any other person.

#### **IX. RESERVATIONS OF RIGHTS BY UNITED STATES**

18. Reservation of Rights Against TLD. The United States reserves, and this Consent Decree is without prejudice to, all rights against TLD with respect to all matters not expressly included within the Covenant Not to Sue TLD by the United States in Paragraph 16. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against TLD with respect to:

- a. liability for failure of TLD to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability based upon TLD's operation of the Site after signature of this Consent Decree by TLD;

e. liability based upon TLD's transportation, treatment, or disposal, or the arrangement for the transportation, treatment, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by TLD; and

f. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

19. Notwithstanding any other provision of this Consent Decree, EPA reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by TLD, or the financial certification made by TLD in Paragraph 42, is false, or in any material respect inaccurate at the time of such provision or certification. If there is a dispute as to whether any of the Financial Information provided by or any certification made by TLD was false or, in any material respect, inaccurate, the dispute shall be referred to the Court, which shall rule on the any dispute under applicable principles of law.

20. General Reservation of Rights Against Mr. Diamond. The United States reserves, and this Consent Decree is without prejudice to, all rights against Mr. Diamond with respect to all matters not expressly included within the Covenant Not to Sue Mr. Diamond by the United States in Paragraph 17. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Mr. Diamond with respect to:

a. liability for failure of Mr. Diamond to meet a requirement of this Consent Decree;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

d. liability, based upon Mr. Diamond's operation of the Site after signature of this Consent Decree by Mr. Diamond;

e. liability based upon Mr. Diamond's transportation, treatment, or disposal, or the arrangement for the transportation, treatment, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Mr. Diamond; and

f. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

21. United States' Pre-certification Reservations of Rights Against Mr. Diamond.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Mr. Diamond:

a. to perform further response actions relating to the Site, or

b. to reimburse the United States for additional costs of response

if, prior to Certification of Completion of the Remedial Action:

(1) conditions at the Site previously unknown to EPA, are discovered, or

(2) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment. For purposes of this Paragraph, the information and the conditions

known to EPA shall include only that information and those conditions known to EPA as of the date of the entry of this Consent Decree, including, the information contained in the documents identified in Appendix C.

22. United States' Post-certification Reservations of Rights Against Mr. Diamond.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Mr. Diamond:

- a. to perform further response actions relating to the Site, or
- b. to reimburse the United States for additional costs of response if subsequent to

Certification of Completion of the Remedial Action:

- (1) conditions at the Site previously unknown to EPA, are discovered, or
- (2) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment. For purposes of this Paragraph, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action or set forth in the Record of Decision ("ROD"), the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action, including the information contained in the documents identified in Appendix C.

23. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all Response Actions authorized by law.

**X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

24. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

25. Except as provided in Paragraph 28 (Waiver of Claims) and Paragraph 33 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Section IX, but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

26. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the

negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA

27. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

28. Settling Defendants agree not to assert any CERCLA claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendants may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendants.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

29. Except as provided in Paragraph 28, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any

person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 28, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

30. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.

31. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to the Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

32. The Settling Defendants also agree that, with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree, they will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it and within 10 days of the filing by Settling Defendants of any counterclaim or cross-claim. In addition, Settling Defendants shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.



33. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VIII.

## **XII. ACCESS AND INSTITUTIONAL CONTROLS**

34. TLD shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States, the State of Illinois, and their representatives, including EPA and its contractors, upon reasonable notice, with access at all reasonable times to the Site, or such other property owned or controlled by it, where access and/or land/water use restrictions are needed to implement response activities at the Site, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States;
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;

5. Assessing the need for, planning, selecting, preparing for, and/or implementing response actions at or near the Site;

6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by TLD or its agents related to response activity at the Site, consistent with Section XIII (Access to Information);

7. Assessing TLD's compliance with this Consent Decree; and

8. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, except as may be required by a governmental authority, refrain from taking any action at the Site, or such other property owned or controlled by it, in any manner that TLD knows would interfere with or adversely affect the implementation, integrity or protectiveness of the removal and/or remedial measures to be performed at the Site. Such restrictions include:

1. except as provided in a plan approved by U.S. EPA, with Illinois EPA concurrence, no action shall be taken to excavate or drill or intrude into, or penetrate or otherwise disturb any facility cover that may be demarcated as part of the remedy to be selected by U.S. EPA for the Site.

2. there shall be no interference of any sort with the construction, operation, maintenance, monitoring, efficacy, or physical integrity of any component, structure, or improvement resulting from or relating to the remedial action on the Site. No action shall be taken that would cause waste materials covered as part of the remedy to become exposed.

3. the Site shall not be used for any of the following purposes:

(a) Residential, including any dwelling units and rooming units, mobile homes or factory built housing, camping facilities, hotels, or other unit constructed or installed for occupancy on a 24-hour basis;

(b) A hospital for humans;

(c) Educational institutions such as a public or private school;

(d) A day care center for children; and

(e) Any use that would disturb or penetrate the facility cover or interfere with the remedy

4. no activities shall be conducted on the Site that extract, consume, or otherwise use any groundwater from the Site, nor shall any wells be constructed on the Property for purposes other than ground water monitoring, unless approved by U.S. EPA.

c. execute and record in the Recorder's Office of Montgomery County, State of Illinois, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 34(b) of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the removal and/or remedial measures to be performed at the Site. TLD shall grant the access rights and the rights to enforce the land/water use restrictions to the United States, on behalf of EPA, and its representatives and the State of Illinois and its representatives. TLD shall, within 45 days of entry of this Consent Decree, submit to EPA for review and approval with respect to such property a draft easement, in substantially the form attached hereto as Appendix D, that is

enforceable under the laws of the State of Illinois, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255. Within 30 days of EPA's approval and acceptance of the easement, TLD shall provide to EPA a title report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards"). Within 15 days of EPA's approval of the title report, TLD shall record the easement with the Recorder's Office of Montgomery County. Within 30 days of recording the easement, TLD shall provide EPA with a certified copy of the original recorded easement showing the clerk's recording stamps.

d. at least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to this Section XII (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to this Section XII (Access and Institutional Controls). At least 30 days prior to such conveyance, TLD shall also give written notice to EPA of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

e. require that any purchaser of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests,

acknowledge in writing its responsibility to comply with all access easements and restrictive easements. Provided the purchaser of TLD's fee interest in property located within the Site acknowledges in writing its responsibility to comply with all access easements and restrictive easements, and TLD has provided a copy of such written acknowledgment to EPA, TLD shall not be liable for the purchaser's compliance with Section XII (Access and Institutional Controls) as it relates to such conveyed property.

35. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall not contest and shall cooperate with EPA's efforts to secure such governmental controls.

36. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

### **XIII. ACCESS TO INFORMATION**

37. Within thirty (30) days of a written request from EPA, Settling Defendants shall provide to EPA copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

38. Confidential Business Information and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.

2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Defendants that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants asserts such a privilege in lieu of providing records, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

39. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.

#### **XIV. RETENTION OF RECORDS**

40. Until four (4) years after the entry of this Consent Decree, Settling Defendants shall preserve and retain all records now in their possession or control, or which come into their possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

41. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendants shall deliver any such records to EPA. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

42. Settling Defendants hereby certify that, to the best of their knowledge and belief, after thorough inquiry, they have:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to their potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against them regarding the Site, and that they have fully complied with any and all EPA requests for information

regarding the Site and TLD's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927; and

b. submitted to EPA all Financial Information that fairly, accurately, and materially sets forth TLD's financial circumstances at the time of such submittal, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time TLD executes this Consent Decree.

#### **XV. NOTICES AND SUBMISSIONS**

43. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

##### **As to the United States:**

##### **As to DOJ:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-11-3-08502)  
P.O. Box 7611  
Washington, D.C. 20044-7611

##### **As to EPA:**

Thomas Krueger  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd, Mail Code C-14J  
Chicago, IL 60604



Dion Novak  
Remedial Project Manager  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd, Mail Code SR-6J  
Chicago, IL 60604

Cyprian Ejiasa  
Comptroller  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd, Mail Code MF-10J  
Chicago, IL 60604-3590

As to Settling Defendants:

William K. Dodds, Esq.  
Dechert LLP  
30 Rockefeller Plaza  
New York, NY 10112-2200

John M. Ix, Esq.  
Dechert LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808

**XVI. RETENTION OF JURISDICTION**

44. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XVII. INTEGRATION/APPENDICES**

45. This Consent Decree and its appendices constitute the final, complete and exclusive Consent Decree and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is a list of the financial documents submitted by TLD to EPA and DOJ;

"Appendix B" is the map of the Eagle Zinc Site;

"Appendix C" is a list of documents submitted to EPA, as provided in Paragraphs 21 and 22; and

"Appendix D" is the draft easement for the Site, as provided in Paragraph 34.

#### **XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

46. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

47. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

#### **XIX. SIGNATORIES/SERVICE**

48. Each undersigned representative of Settling Defendants to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resource Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

49. Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

50. Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on their behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

**XX. FINAL JUDGMENT**

51. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS

16th DAY OF SEPTEMBER, 2008


s/Jeanne E. Scott

United States District Judge


THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. T.L. Diamond & Company, Inc. (C.D. Ill.), relating to the Eagle Zinc Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: 11 March 2008

  
s/ RONALD J. TENPAS

Assistant Attorney General  
Environment and Natural Resources Division  
P.O. Box 7611  
U.S. Department of Justice  
Washington, D.C. 20044-7611

  
s/ Justin A. Savage

Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
(202) 514-5293


RODGER A. HEATON  
United States Attorney


  
s/ GERALD BROST

Assistant United States Attorney  
Central District of Illinois  
318 S. 6<sup>th</sup> Street  
Springfield, IL 62701

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. T.L. Diamond & Company, Inc. (C.D. Ill.), relating to the Eagle Zinc Superfund Site.

FOR THE UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY

  
S / Richard Karl  
Director, Superfund Division, Region 5  
U.S. Environmental Protection Agency  
77 W. Jackson Blvd.  
Chicago, IL 60604

  
S / Thomas Krueger  
Associate Regional Counsel  
U.S. Environmental Protection Agency  
77 W. Jackson Blvd.  
Chicago, IL 60604

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. T.L. Diamond & Company, Inc. (C.D. Ill.), relating to the Eagle Zinc Superfund Site.

FOR DEFENDANT T.L. DIAMOND & Co., INC.

Date: 12/26/07

  
S/ Theodore L. Diamond

President

T.L. Diamond & Company, Inc.

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: William K. Dodds, Esq.

Title: Counsel to T.L. Diamond & Co., Inc.

Address: Dechert LLP, 30 Rockefeller Plaza, New York, NY 10112-2200

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. T.L. Diamond & Company, Inc. (C.D. Ill.), relating to the Eagle Zinc Superfund Site.

FOR DEFENDANT THEODORE L. DIAMOND

Date: 12/26/07

  
sv Theodore L. Diamond

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: William K. Dodds, Esq.

Title: Counsel to Theodore L. Diamond

Address: Dechert LLP, 30 Rockefeller Plaza, New York, NY 10112-2200